Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–625 OF 1995
MOKHTAR SIDIN, AZMEL AND ZULKEFLI JJCA
11 AUGUST 2006

Companies and Corporations — Directors — Breach of fiduciary duties — Whether companies only entitled to profits, and not gross income derived by directors from their breaches — Expenditure to be taken into account

The respondents/plaintiffs were in the business of engineering consultancy and advisory services. The first and second appellants/defendants were directors of the first respondent (the first appellant was also managing director) and all three appellants were directors of the second respondent. The first respondent was appointed as Project Manager by STMB for the establishment and running of the TV3 channel. The second respondent was merely appointed as consultant engineers for the TV3 Project. The first respondent's appointment placed no limitation on the contract period, save that termination was provided in the event of the resignation of key personnel or a break-up in the partnership of the first respondent. On 1 November 1983 the first appellant issued a letter in the name of the first respondent to STMB informing STMB that certain key personnel of the first respondent would be resigning, and leaving the continuation of the first respondent's consultancy services in the discretion of STMB. On 18 November 1983 STMB issued a letter to the first respondent terminating its services based on the grounds in the first appellant's letter. On 30 November 1983 the appellants registered a partnership under the name of 'Perunding AJZ' to carry on the same business as that of the first respondent and they were appointed as consultants for the TV3 Project by STMB in place of the first respondent. On 1 April 1985 the Supreme Court on an appeal by the respondents entered summary judgment on liability against the appellants/defendants for breach of fiduciary duty. Pursuant to the Judgment, the Senior Assistant Registrar of the High Court ('the SAR') assessed damages in the sum of RM1,119,867.25 being the gross income derived by the appellants from their breach and affirmed by the High Court judge. The appellant's appeal and cross-appeal by the respondents were heard by the Court of Appeal. The main issue to be decided in this appeal by the appellants is whether the respondents are only entitled to profits, and not gross income derived by the appellants from their breaches. In the course of the hearing, the Court of Appeal ordered the SAR to take an account of the income and expenses incurred by the appellants and submit his findings to the Court of Appeal. The purpose of the Court of Appeal's order was to clarify the expenditure incurred by the appellants in earning the income of RM1,119,867.25 so as to enable the Court of Appeal to determine the amount of expenditure to be deducted from the gross income.

Held, allowing the appellants' appeal and dismissing the respondents' cross appeal:

(1) The expenditure incurred in engaging the services of third parties would in any event have to be appointed and similar expenses incurred by the first respondent in the event that the first respondent's appointment had been continued since Phase 1 involved specialist jobs. There was no suggestion by the respondent that the expenditure would have been any different from that incurred by the appellants. We are of the view that the appellants are entitled to claim the professional fees totaling RM197,131 (see paras 19–21)

(2) The partners' salaries, allowances and bonuses were the salaries, allowances and bonuses paid to the appellants in respect of the work carried out by them on Phase 1. These payments are fair as the appellants would have in any event received remuneration from the first respondent for work done in respect of Phase 1. It should be noted that the appellants were not remunerated for their services by the first respondent. It must also be borne in mind that the contract depended primarily on the first appellant's special skills and the income could not have been earned without his skills. If the first appellant had to leave the first respondent, they would have had to engage other experts to do the job, which would necessarily incur expenses (see paras 23–24).

(3) As for the bonuses, the appellants claimed that the period from 1 December 1983 to 28 February 1984 was a very hectic period during which work had to be carried out on a very urgent basis in view of the tight deadline imposed by STMB. During this period the partners and staff of Perunding AJZ were working round-the-clock to complete the work. Hence, the bonuses paid during this period represented reasonable incentive payments for completion of the work. Therefore the appellants' are allowed to claim for deduction for partners' salaries, allowances and bonuses for a total sum of RM87,000 and the sum of RM74,003 for staff salaries and bonuses (see paras 25–27).

(4) As regards the submission of the appellants that the third appellant ought not be liable to pay damages to the first respondent because he was only a director of the second respondent, firstly, both the first and second respondents are one and the same. This is an indisputable finding of the Supreme Court. Secondly, the third appellant was complicit in the first and second appellants' breach of fiduciary duties owed to the first respondent. They set up partnership together and stole the business away from both respondents. Thirdly, for the purposes of assessing the income of the appellants, it is impossible to apportion the same into two as the appellants were appointed to do the work by a single contract for all the work. The notional separation of work between the first and second respondents was not preserved after the appellants hijacked their business. In the circumstances of this case it is clear that all three appellants had breached their fiduciary duties to the respondents and should bear the same in equal parts or alternatively, in proportion to their respective shares in Perunding AJZ (see paras 37–38).

[Bahasa Malaysia summary

Responden/plaintif adalah perunding kejuruteraan dan perkhidmatan penasihat. Perayu/defendan pertama dan kedua adalah pengarah di responden pertama (perayu

pertama juga merupakan pengurus pengarah) dan ketiga-tiga perayu adalah pengarah di responden kedua. Responden pertama dilantik sebagai Pengurus Projek oleh Sistem Televisyen Malaysia Bhd (STMB) untuk menubuhkan dan mengendalikan siaran TV3. Responden kedua hanya dilantik sebagai perunding kejuruteraan untuk Projek TV3. Pelantikan responden pertama tidak dihadkan oleh jangka masa kontrak, hanya bahawa penamatan boleh berlaku sekiranya terdapat orang utama meletak jawatan ataupun terdapat keruntuhan perkongsian responden pertama. Pada 1 November 1983 perayu pertama mengeluarkan satu surat di atas nama responden pertama kepada STMB memaklumkan kepada STMB bahawa orang utama responden pertama akan meletak jawatan, dan meninggalkan penerusan perkhidmatan penasihat kepada budi bicara STMB. Pada 18 November 1983 STMB mengeluarkan satu surat kepada responden pertama menamatkan perkhidmatannya berdasarkan surat perayu pertama. Pada 30 November 1983 perayu-perayu mendaftarkan satu perkongsian di bawah nama 'Perunding AJZ' untuk menjalankan perniagaan yang sama seperti responden pertama dan mereka dilantik sebagai perunding kepada Projek TV3 oleh STMB menggantikan responden pertama. Pada 1 April 1985, Mahkamah Agung melalui rayuan responden-responden memasukkan penghakiman terus atas liabiliti terhadap perayu/defendan kerana telah melanggar kewajipan fidusiari. Berhubungan dengan penghakiman tersebut, Timbalan Pendaftar Mahkamah Tinggi ('TP') telah mentaksirkan ganti rugi sejumlah RM1,119,867.25 yang merupakan pendapatan kasar yang diperoleh oleh perayu-perayu melalui pelanggaran dan hakim mahkamah tinggi mengekalkan keputusannya. Perayu-perayu merayu dan rayuan balas oleh responden didengar oleh Mahkamah Rayuan. Isu utama untuk diputuskan dalam rayuan ini oleh perayu-perayu ialah sama ada responden-responden hanya berhak kepada keuntungan bersih dan bukan pendapatan kasar perayu melalui pelanggaran mereka. Semasa pendengaran, mahkamah rayuan telah memerintahkan TP untuk mengambil kira pendapatan dan perbelanjaan yang dikenakan oleh perayu-perayu dan menyerahkan cariannya kepada mahkamah rayuan. Tujuan perintah mahkamah rayuan tersebut adalah untuk menjelaskan perbelanjaan yang ditanggung oleh perayu-perayu daripada pendapatan yang diperolehnya sebanyak RM1,119,867.25 supaya mahkamah rayuan dapat memastikan perbelanjaan yang harus dipotong daripada pendapatan kasar.

Diputuskan, membenarkan rayuan perayu-perayu dan menolak rayuan balas responden:

(1) Perbelanjaan yang ditanggung dalam mendapatkan perkhidmatan pihak ketiga yang, dalam sebarang keadaan pun terpaksa dilantik dan perbelanjaan yang sama yang ditanggung oleh responden pertama sekiranya pelantikan responden pertama telah diteruskan semenjak Fasa 1 meliputi kerja-kerja pakar. Tiada cadangan oleh responden bahawa perbelanjaan tersebut akan berbeza daripada yang ditanggung oleh perayu. Kami berpendapat bahawa perayu-perayu berhak menuntut yuran profesional yang berjumlah RM197,131 (lihat perenggan 19–21).

(2) Gaji, elaun dan bonus rakan kongsi merupakan gaji, elaun dan bonus yang dibayar kepada perayu berhubung dengan kerja yang dijalankan oleh mereka pada Fasa pertama. Pembayaran ini adalah adil memandangkan perayu-perayu

akan dalam apa juga keadaan menerima gaji mereka daripada responden pertama untuk kerja-kerja yang dilakukan berhubungan dengan Fasa pertama. Ia harus diperhatikan bahawa perayu-perayu tidak diberi gaji untuk perkhidmatan mereka oleh responden pertama. Ia juga harus diperhatikan bahawa kontrak tersebut bergantung terutamanya kepada kemahiran khas perayu dan pendapatan tersebut tidak akan dapat diperoleh tanpa kemahirannya. Sekiranya perayu pertama terpaksa meninggalkan responden, mereka juga terpaksa mendapatkan pakar-pakar yang lain untuk melakukan kerja-kerja tersebut, di mana ia akan menyebabkan perbelanjaan (lihat perenggan 23–24).

(3) Berhubungan dengan bonus, tuntutan perayu-perayu dari tarikh 1 Disember 1983 sehingga 28 Februari 1984 merupakan tempoh masa yang sangat sibuk di mana kerja terpaksa dilakukan atas dasar ia memerlukan tindakan yang segera disebabkan STMB mengenakan tempoh tarikh yang singkat. Dalam masa ini, rakan kongsi dan pekerja-pekerja Perunding AJZ telah bekerja siang malam untuk menghabiskan kerja-kerja. Dengan itu, bonus yang dibayar pada tempoh tarikh ini adalah mewakili insentif pembayaran yang munasabah untuk menghabiskan kerja-kerja. Dengan itu perayu-perayu dibenarkan menuntut tolakan untuk gaji rakan kongsi, elaun dan bonus untuk jumlah RM87,000 dan jumlah RM74,003 untuk gaji dan bonus pekerja-pekerjanya (lihat perenggan 25–27).

(4) Berhubung dengan hujahan perayu-perayu bahawa perayu ketiga tidak sepatutnya bertanggungan untuk membayar ganti rugi kepada responden pertama oleh kerana ia hanya merupakan pengarah responden kedua, pertamanya kedua-dua responden pertama dan kedua adalah sama dan serupa. Ini merupakan penemuan Mahkamah Agung yang tidak dapat dipertikaikan. Kedua, perayu ketiga adalah terlibat bersama perayu pertama dan kedua dalam pelanggaran kewajipan fidusiari terhadap responden pertama. Mereka bersama menubuhkan satu perkongsian dan mencuri perniagaan tersebut daripada kedua-dua responden. Ketiga, untuk tujuan menaksir pendapatan perayu-perayu, adalah mustahil untuk membahagikan pendapatan tersebut kepada dua oleh kerana perayu-perayu tidak dilantik untuk melakukan kerja melalui satu kontrak tunggal untuk kesemua kerja-kerja tersebut. Tanggapan pembahagian kerja-kerja di antara responden pertama dan kedua tidak dikekalkan setelah perayu-perayu merampas perniagaan mereka. Dalam keadaan kes ini, adalah jelas bahawa ketiga-tiga perayu telah melanggar kewajipan fidusiari mereka kepada responden-responden dan sepatutnya membiayainya secara sama banyak atau, secara alternatif mengikut bahagian mereka masing-masing sebagai pemegang saham di Perunding AJZ (lihat perenggan 37–38).]

Notes

For cases on breach of fiduciary duties of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 166–170.

Cases referred to

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209 (refd)

Warman International Limited & Anor v Brian Dwyer & 2 Ors [1995] 2 CLJ 326 (refd)

Appeal from: Suit No C336 of 1984 (High Court, Kuala Lumpur)

Dato' Cecil Abraham (Dhinesh Bhaskaran with him) (Shearn Delamore & Co) for the appellants.
David Morais (Khabir Dhillon with him) (M David Morais) for the respondents.

Zulkefli JCA (delivering judgment of the court):

INTRODUCTION

[1] On 1 April 1985, the Supreme Court on an appeal by the respondents ('the plaintiffs in the court below') entered summary judgment on liability against the appellants ('the defendants in the Court below') for breach of fiduciary duty, with damages to be assessed ('the judgment'). The salient part of the order of the Supreme Court reads as follows:

> AND THIS COURT BOTH DECLARE that the defendants abovenamed had acted in breach of the fiduciary duty owed to the plaintiffs AND IT IS FURTHER ORDERED that the Senior Assistant Registrar of the High Court at Kuala Lumpur do inquire into and assess the damages payable by the defendants to the plaintiffs by reason of the breach as aforesaid AND IT IS ALSO ORDERED that the defendants do pay to the plaintiffs the damages so assessed AND IT IS FURTHER ORDERED that the defendants do account to the plaintiffs all income in respect of all contracts for services secured by them or Perunding AJZ between the 30th day of November 1983 and the 1st day of March 1984 AND IT IS FURTHER ORDERED that the Senior Assistant Registrar of the High Court at Kuala Lumpur do inquire into the account aforesaid and determine the sum payable by the defendants or Perunding AJZ to the plaintiffs …

[2] Pursuant to the judgment, on 15 December 1994, the Senior Assistant Registrar of the High Court ('the SAR') assessed damages in the sum of RM1,119,867.25 being the gross income derived by the appellants from their breach. Both appellants and the respondents appealed to the High Court judge against the SAR's decision.

[3] Before the High Court judge, the appellants contended that the SAR should have only awarded the respondents the profits, instead of the gross income derived by the appellants from their breach. The respondents on the other hand contended that the SAR should have awarded them RM6,654,699.24 and not RM1,119,867.25. Both appeals were dismissed by the High Court judge on 24 August 1995. The appellants appealed to the Court of Appeal against the High Court judge's decision, and the respondents filed a cross appeal.

[4] On 29 April 2002, the appeal and cross-appeal were heard by the Court of Appeal. In the course of the hearing, the Court of Appeal ordered the SAR to take an account of the income and expenses incurred by the appellants and submit his

findings to the Court of Appeal. The Court of Appeal adjourned the hearing pending the completion of this exercise. The purpose of the Court of Appeal's order was to clarify the expenditure incurred by the appellants in earning the income of RM1,119,867.25 so as to enable the Court of Appeal to determine the amount of expenditure to be deducted from the gross income.

[5] The Deputy Registrar of the High Court duly recorded the further evidence of expenditure and the additional evidence adduced before the Deputy Registrar is now before the Court of Appeal again (see Appeal Record (Vol 2) at pp 10–55).

FACTS OF THE CASE

[6] The relevant facts of the case are as follows:

(1) The respondents were in the business of engineering consultancy and advisory services. The first and second appellants were Directors of the first respondent (the first appellant was also Managing Director) and all three appellants were Directors of the second respondent.

(2) On 13 September 1983, Fleet Group Sdn Bhd ('Fleet Group') on behalf of System Television Malaysia Bhd ('STMB') appointed the first respondent as its Project Manager for the establishment and running of the TV3 channel ('the TV3 Project'). The second respondent by the same letter of appointment were merely appointed as consultant engineers for the TV3 Project.

(3) The TV3 Project was divided into five Phases. Phase 1 involved setting up a Studio Complex at Jalan Liku, Off Jalan Bangsar, Kuala Lumpur and the main transmitter station for the Klang Valley at Bukit Sungei Besi at a cost of RM20 million. Most of the work in Phase 1 was in relation to the Studio Complex. Phases 2 to 5 involved setting up additional transmitter stations to extend coverage nationwide at a cost of RM5 million per station.

(4) The first respondent's appointment placed no limitation on the contract period, save that termination was provided in the event of the resignation of key personnel or a break up in the partnership of the first respondent.

(5) On 1 November 1983, the first appellant issued a letter in the name of the first respondent to STMB informing STMB that certain key personnel of the first respondent would be resigning, and leaving the continuation of the first respondent's consultancy services in the discretion of STMB.

(6) On 18 November 1983, STMB issued a letter to the first respondent terminating its services based on the grounds in the first appellant's letter.

(7) On 30 November 1983, the appellants registered a partnership under the name of "Perunding AJZ" to carry on the same business as that of the first respondent.

(8) On 5 December 1983, Perunding AJZ were appointed as consultants for the TV3 Project by STMB in place of the first respondent.

(9) On 15 February 1984, the respondents filed an action in the High Court against the appellants for breach of fiduciary duty and as stated earlier, judgment on liability was entered against the appellants on 1 April 1985.

(10) In their judgment, the Supreme Court expressly stipulated that the accounting period for the assessment of damages was in respect of 'all contracts for services secured by them [the appellants] or Perunding AJZ between the 30th day of November 1983 and the 1st day of March 1984.'

(11) The only contract secured by the appellants within the said accounting period was the appointment of Perunding AJZ by STMB on 5 December 1983.

(12) Between 25 January 1984 and 5 June 1992 the appellants received RM5,654,699.24 as income from STMB. Of this sum, RM1,119,867.25 was in respect of Phase 1 of the TV3 Project, while the remainder was in respect of Phases 2, 3 and 4. The first appellant estimated an additional RM1,000,000 was payable for completion of Phase 4 of the Project.

DECISION OF THE COURT ON APPEAL

[7] The main issue to be decided in this appeal by the appellants is whether the respondents are only entitled to profits, and not gross income derived by the appellants from their breaches. It is the appellants' case that the respondents are only entitled to profits and that the appellants should be allowed to make deductions for the expenditure incurred by them to earn the income. We are in agreement with the contention of the appellants and it is for this reason that this court had earlier ordered the SAR to take an account of the income and expenses incurred by the appellants and submit his findings to the court. On this point, we find support in the principle as applied in the Australian High Court case of *Warman International Limited & Anor v Brian Dwyer & 2 Ors* [1995] 2 CLJ 326. In that case, there was a breach of fiduciary duty by the general manager of the company ('the former employer') when he formed new companies to carry out the business of the former employer. The court inter alia held that in ascertaining the damages the former employer would be entitled, the appropriate order is for an account of profits of the business of the new companies before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them.

[8] Both the SAR and the High Court judge awarded the respondents the total gross income received by the appellants from Phase 1, but did not give the appellants any credit for the expenditure incurred by them to earn the income. Both the SAR and the High Court judge were of the view that the appellants had failed to adequately prove this expenditure.

[9] It is the contention of the appellants that there is sufficient credible evidence of the expenditure incurred by the appellants in earning the income, and hence credit should be given for the same. On the other hand, the respondents contended that the

appellants have not adduced admissible evidence on its expenditure and consequently no reduction should be given on account of expenditure.

PERUNDING AJZ'S ROLE IN PHASE 1

[10] On the evidence adduced, we find that Perunding AJZ's main involvement in Phase 1 was in setting up the Studio Complex. In this regard, Perunding AJZ acted as Project Manager, systems designer and integrator for the studio equipment. At the same time, Perunding AJZ engaged third parties to carry out other input and supervisory work in relation to inter alia acoustics and transmitter systems. As for Phases 2 to 5, Perunding AJZ's involvement was primarily as a Project Manager, engaging third parties to set up the additional transmitter stations.

[11] STMB had informed Perunding AJZ that they had secured the rights to broadcast the Olympic Games scheduled to be held in Los Angeles in June 1984 and that STMB wanted the Studio Complex to be ready to broadcast this event. Hence, the heaviest utilization of Perunding AJZ's personnel and resources for Phase 1 was during the period from December 1983 to June 1984. This is also evidenced by the fact that 63.33% of the income for Phase 1 was received as at 27 January 1984 and 84.46% of the income for Phase 1 was received as at 9 June 1984.

[12] In addition, from December 1983 to the end of June 1984 Perunding AJZ only had one project, namely Phase 1, and hence all of its personnel and resources during this period were focused on Phase 1. From July 1984 until March 1985, Perunding AJZ continued working on Phase 1 while simultaneously working on Phase 2 although most of Perunding AJZ's personnel and resources were still focused on Phase 1.

[13] The appellants contended that the expenditure incurred by the appellants can be divided into two categories namely:

(i) expenditure incurred from 1 December 1983 to 28 February 1984; and

(ii) expenditure incurred from 1 March 1984 to 30 June 1984.

[14] The breakdown of the expenditure from 1 December 1983 to 28 February 1984 can be found in the accounts of Perunding AJZ for this period which were audited by an external firm of auditors, Messrs YL Lim & Co (see the letter dated 16-10-85 from Messrs YL Lim & Co and the profits and loss account at appeal record (Vol 2) at pp 89–91). Mr YL Lim (DW3) of Messrs YL Lim & Co testified before the Deputy Registrar that his staff verified the income and expenses and found that all the items were supported by proper documents. After discussing the findings with his staff, DW3 issued his opinion that the profit and loss statement together with the notes thereto were fairly stated.

[15] As for the breakdown of expenditure from 1 March 1984 to 30 June 1984, this can be found in the summary ('the summary') prepared by Perunding AJZ's accounts personnel prior to the inquiry into damages (see appeal record (Vol 2) at p 93).

[16] The appellants also contended that they incurred further expenditure for Phase 1 from July 1984 to March 1985 which is when Phase 1 was completed. However, the appellants are limiting their claim to expenses incurred from 1 December 1983 to 30 June 1984.

[17] The appellant's witnesses in their evidence at the trial had stated that they have attempted to locate the source documents based on which the profit and loss statement and summary were prepared. However, they have been unable to locate the source documents as they have been lost or destroyed given the long time lapse of over 20 years during which time Perunding AJZ has also moved office four or five times. On this point, we took the view that the profit and loss statement and the summary prepared for the appellants' case to show the breakdown of expenditure from 1 December 1983 to 28 February 1984 should be accepted as admissible evidence of the expenditure incurred by the appellants in earning the income. We are satisfied with the explanation given by the appellants for their inability to locate the said source documents. Moreover, we find the evidence of DW3, the accountant from Messrs YL Lim & Co supported the appellants' case when DW3 stated that his firm had verified the income and expenses and found all the items were supported by proper documents.

EXPENDITURE INCURRED FROM 1 DECEMBER 1983 TO 28 FEBRUARY 1984

[18] The details of the profit and loss statement are set out in the document headed 'Accounts for Legal Case' (see appeal record (Vol 2) at pp 95–98). The accounts for legal case was prepared in 1985 by the accounts personnel of Perunding AJZ as explanatory notes to the profit and loss statement for review by Messrs YL Lim & Co. Below are the claims of the appellants for the breakdown of the items of expenditure in both the accounts for legal case and the summary and our findings on them:

PROFESSIONAL FEES

[19] Perunding AJZ had engaged the services of the following third parties for Phase 1 as follows:

(1) Marshall Day Acoustics Limited ('MDA') were the consultants appointed for the acoustical design, supervision and commissioning of the Studio Complex. MDA completed their work by June 1984. By their letter dated 8 May 2002, MDA confirmed the receipt by them of payments from Perunding AJZ. Part of the sums referred to in the letter were paid by Perunding AJZ between 1 December 1983 and 28 February 1984 whereas the remainder was paid by Perunding AJZ between 1 March 1984 and 30 June 1984.

(2) Tecas Sdn Bhd ('Tecas') were the consultants appointed to help the design for the supply and installation of transmitting equipment. Tecas was appointed by a letter dated 5 September 1983. Although Tecas was appointed by the first respondent, all payments to Tecas were made by Perunding AJZ. This was confirmed by the evidence of Encik Abu Fatah Sanusi bin Mohd Ambia (DW2), the Engineering Director of Tecas at the time.

(3) Bumi Permai Sdn Bhd ('BP') were appointed to provide additional supervisory personnel for Phase 1, given that Phase 1 had to be completed on an urgent basis in time for the Olympic Games in June 1984. BP completed their work by June 1984. BP is no longer in business and hence the appellants were unable to obtain any confirmatory letters from them.

[20] We are in agreement with the contention of the appellants that it must be borne in mind that these, or similar, third parties would in any event have to be appointed and similar expenses incurred by the first respondent in the event that the first respondent's appointment had been continued by STMB since Phase 1 involved specialist jobs. There was no suggestion by the respondent that the expenditure would have been any different from that incurred by the appellants.

[21] In the circumstances of this case we are of the view that the appellants are entitled to claim the professional fees totaling RM197,131.

PARTNERS' SALARIES, ALLOWANCES AND BONUSES

[22] These were the salaries, allowances and bonuses paid to the appellants in respect of the work carried out by them on Phase 1.

[23] We find these payments are fair as the appellants would have in any event received remuneration from the first respondent for work done in respect of Phase 1. It should be noted that the appellants were not remunerated for their services by the first respondent.

[24] It must also be borne in mind that the contract depended primarily on the first appellant's special skills and the income could not have been earned without his skills. If the first appellant had to leave the first respondent, they would have had to engage other experts to do the job, which would necessarily incur expenses.

[25] As for the bonuses, the appellants claimed that the period from 1 December 1983 to 28 February 1984 was a very hectic period during which work had to be carried out on a very urgent basis in view of the tight deadline imposed by STMB. During this period the partners and staff of Perunding AJZ were working round-the-clock to complete the work. Hence, the bonuses paid during this period represented reasonable incentive payments for completion of the work.

[26] We would therefore allow the appellants' claim for deduction under these items for a total sum of RM87,000.

STAFF SALARIES AND BONUSES

[27] These were the salaries and bonuses paid to the various employees of Perunding AJZ identified therein in respect of work done by them on Phase 1. For the same reason stated above in respect of partners' salaries and bonuses, the bonuses paid during this period represented incentive payments for completion of

the work on an urgent basis. We would allow the claim for deductible expenditure under these items for a sum of RM74,003.

TRAVELLING EXPENSES

[28] The appellants claimed that several factory inspections of equipment to be delivered for Phase 1 had to be made abroad, and in some instances the systems had to be pre-wired at the factories to expedite the eventual installation at the TV3 studio in view of the tight timeline. Thirteen foreign contractors were alleged to have been selected for tender, as set out in the list of equipment manufactured abroad. On the claim under this item, we agree with the submission of the respondents that the claim of RM46,998 appears suspicious. This was said to be travelling to source equipment. However, the letters of intent to purchase the equipment were issued while the appellants were still with the respondents. Further, most of all this travel took place after the accounting period in May to July 1984. We therefore disallowed the appellants' claim for deductible expenditure under this item.

MOTOR VEHICLES EXPENSES

[29] The claim of RM7,682 should also be disallowed as the appellants have included in this the installments for their vehicles. This surely has nothing to do with costs incurred in generating an income.

ENTERTAINMENT

[30] The claim of RM7,566 for entertaining 'clients and suppliers' is not reasonably shown by the appellants to be an expense incurred in generating their income or profit. We are of the view it should not be allowed as such.

OTHER ALLEGED EXPENDITURE

[31] On the other minor items the appellants had claimed for allowable deductions, we find that these payments cannot be deducted as the evidence produced is inadmissible or otherwise lacking in credibility.

Expenditure incurred from 1 March 1984 to 30 June 1984

[32] The appellants claimed that the expenditure for this period was RM581,884.30, and the details are as set out in the summary. We find that the claim for expenses for the period 1 March 1984 to 30 June 1984 is not supported by admissible evidence. It is based entirely on the unaudited summary of management accounts (see appeal record (Vol 2) at p 93). No supporting documents have been produced nor has an acceptable explanation for the lack of these documents been given.

[33] We also find that the issue of claims for expenses for the period 1 March 1984 to 30 June 1984 was introduced for the first time in the assessment ordered by this court. It was never raised in any of the previous proceeding. We would therefore

refuse the claim for allowable deduction on the expenditure from 1 March 1984 to 30 June 1984.

TOTAL EXPENDITURE ALLOWED

[34] Based on the above, the total expenditure claimed by the appellants that we would allow are the sum of RM197,131 for professional fees, the sum of RM87,000 for partners' salaries, allowances and bonuses and the sum of RM74,003 for staff salaries and bonuses. Hence the net profit payable to the first respondent is RM1,119,867.25 – RM358,134.00 = RM761,733.25 and not RM1,119,867.25 as earlier awarded by the court.

SUBSIDIARY ISSUES

[35] Learned counsel for the appellants in his submission pointed out to us that in the statement of claim, it was pleaded that the second respondent was entitled to the benefits of the first respondent's appointment as the first respondent was a subsidiary of the second respondent. Accordingly, judgment was granted in favour of both the respondents and the amount payable to each respondent was not specified therein. However, the appellants contended PW2 had testified that first respondent was not a subsidiary of the second respondent. In addition, STMB appointed the first respondent, not the second respondent as project managers. The second respondent was merely appointed in a limited capacity as the consultant engineers. For these reasons, the appellants therefore contended that the income sought by the respondents and the damages was that due to the first respondent, and not the second respondent. On this point, we do not agree with the contention of the appellants that damages should only have been awarded to the first respondent.

[36] It does not appear proper before us now for the appellants to reargue that the first respondent was not a subsidiary of the second respondent. The Supreme Court in this case had made a positive adjudication that it was indeed subsidiary. In the judgment of the Supreme Court for this case as reported in the case of *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209, his lordship Salleh Abas LP at p 210 had this to say:

> Avel Consultants Sdn Bhd (Avel) is a subsidiary of another company called Elmec Consultants Sdn Bhd (Elmec). The first and second respondents were directors of both Elmec and Avel, whilst the third respondent is the director of Elmec only, the parent company.

In our view as these companies are one and the same, it does not matter which role they notionally played in the TV3 Contract. The benefits accruing from the TV3 Contract goes to both of them.

[37] As regards the submission of the appellants that the third appellant ought not be liable to pay damages to the first respondent because he was only a director of the second respondent, we say with respect, that this is also misplaced. Firstly, both the first and second respondents are one and the same. This is an indisputable finding of the Supreme Court. Secondly, the third appellant was complicit in the first and

second appellants' breach of fiduciary duties owed to the first respondent. They set up partnership together and stole the business away from both respondents. Thirdly, for the purposes of assessing the income of the appellants, it is impossible to apportion the same into two as the appellants were appointed to do the work by a single contract for all the work. The notional separation of work between the first and second respondents was not preserved after the appellants hijacked their business.

[38] In the circumstances of this case, it is clear that all three appellants had breached their fiduciary duties to the respondents and should bear the same in equal parts or alternatively, in proportion to their respective shares in Perunding AJZ.

THE RESPONDENTS' CROSS APPEAL

[39] We shall now deal with the respondents' cross-appeal. In their cross-appeal, the respondents want the damages to be increased from RM1,119,867.25 to RM6,654,699.24 on the basis that the contract in question was not limited to Phase 1 of the Project, but also covered Phases 2, 3 and 4. Both the SAR and the High Court judge disagreed with the respondents and held that the contract was limited to Phase 1 only.

[40] Having perused the evidence adduced at the trial, we find the learned High Court judge's finding draws support from the evidence led before the SAR. We noted that the reference to stages of work in the letter of appointment to Perunding AJZ as consultants indicates that there were different phases of work (see letter of appointment at appeal record (Vol 1) at pp 269–270). The evidence of Mr Thong Tat Chou (PW3), an ex-accountant of STMB showed that it was clear the project for the purpose of the appellants' case only involved Phase 1. The letter of the termination from STMB to the first respondent dated 18 November 1983 also showed that it referred only to Phase 1 of the project. The minutes of the Task Force meetings show that Phase 2 only commenced on 23 April 1984 (see appeal record (Vol 1) at pp 362–364 and 366–368]. This fact was confirmed in the evidence of DW2 the former General Manager of Fleet Group. We find that the SAR had already decided these issues as questions of fact after trial and we find no reasons to disturb such finding of facts.

CONCLUSION

[41] For the grounds above stated, we would allow the appellants' appeal with costs here and the court below and dismiss the respondents' cross-appeal with costs. All orders made by the court below are hereby set aside. We would also make an order that the damages to be awarded to the respondents are hereby reduced from RM1,119,867.25 to RM761,733.25. The deposit paid by the appellants for this appeal is to be refunded to the appellants and the deposit paid by the respondents for the cross-appeal is to be paid to the appellants on account of taxed costs.

A **[42]** My learned brothers, Mokhtar Sidin and Azmel JJCA, have seen this judgment in draft and they have expressed their agreement with it.

Appellants' appeal allowed. Respondents' cross appeal dismissed.

B Reported by Sally Kee

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